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No. 06-562

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a party that is a "covered person" under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), may bring an action against another covered person for cost recovery under Section 107(a).

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BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a party that is a "covered person" under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), but is not entitled to bring a contribution action under Section 113(f) of CERCLA, can recover a portion of its response costs from other covered persons through a cost-recovery action under Section 107(a). *Amicus* has a significant interest in the resolution of this question because—consistent with one of CERCLA's principal objectives—it has voluntarily initiated remediation activities at sites throughout the United States. If this Court were to conclude that covered persons may not recover costs under Section 107(a), *amicus* would be forced unjustly and unjustifiably to bear costs that are in large part attributable to other parties, including the United States government. For that reason, Lockheed Martin Corporation has frequently participated as an *amicus curiae* in litigation concerning the right of voluntary remediators to recover costs from other responsible parties under CERCLA. *See, e.g.*, Br. of Lockheed Martin Corporation as *Amicus Curiae* in Support of Respondent, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004) (No. 02-1192).

Lockheed Martin is one of the world's leading advanced technology and aerospace companies. Approximately eighty-

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

five percent of Lockheed Martin's business is with the United States Department of Defense and various federal agencies. In connection with this work, Lockheed Martin owns or operates a number of facilities that were formerly owned or operated by the federal government. A holding that eliminates a voluntary remediator's right to cost recovery under Section 107(a) could effectively bar Lockheed Martin from recovering any portion of its voluntary cleanup costs at these sites and insulate the federal government from its substantial CERCLA liability. For example, Lockheed Martin has brought suit against the United States under Section 107(a) to recover tens of millions of dollars it expended to remedy the release of hazardous substances from a military production facility that the United States formerly operated in Hempstead, New York. *See Lockheed Martin Corp. v. United States*, No. 06-01438 (D.D.C. filed Aug. 15, 2006). The United States has moved to dismiss the suit on the ground that, as a covered person, Lockheed Martin is not permitted to recover costs under Section 107(a).

If the decision below were reversed, Lockheed Martin and other industry members would be compelled to postpone cleanup activities until they are sued under CERCLA in order to ensure that they could recover a portion of their response costs from other responsible parties—a result that conflicts with CERCLA's goal of promoting the prompt, voluntary remediation of hazardous waste sites.

STATEMENT

Section 107(a) of CERCLA authorizes "the United States Government or a State or an Indian tribe," or "any other person," to recover its hazardous waste cleanup costs from "covered persons" legally responsible for the contamination.[2] 42

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[2] Section 107(a) imposes liability for the payment of response costs on four categories of "covered persons," so denominated by the title of the section. 42 U.S.C. § 9607(a). These categories of covered persons are

U.S.C. § 9607(a)(4)(A), (B). If, as the government argues, covered persons are prohibited from recovering costs under Section 107(a) and are also prohibited from seeking contribution under Section 113(f)(1) without first being sued or settling their liability with the United States or a State, then CERCLA—which Congress intended to be a *comprehensive* statutory framework governing hazardous waste remediation—contains a vast loophole that significantly undermines its remedial efficacy.

1. At its facility in Camden, Arkansas, respondent retrofitted rocket motors under contract with the United States from 1981 to 1986. During the retrofitting process, hazardous substances were released into the environment, causing soil and groundwater contamination at the site. J.A. 23-26. Respondent voluntarily undertook cleanup operations to address these releases, and then filed suit in the Western District of Arkansas to recover a portion of its cleanup costs from the United States. J.A. 29-32. Respondent initially sought recovery under both Sections 107(a) and 113(f)(1) of CERCLA. J.A. 18-19. After this Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), which held that contribution actions under Section 113(f)(1) may be brought only "during or following" a Section 106 or Section 107(a) civil action, respondent dropped its Section

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[Footnote continued from previous page]

commonly referred to as "potentially responsible parties" or "PRPs." Although courts have generally used the terms "covered person" and "PRP" interchangeably, "covered person" is more accurate because it is the term that Congress used in the statute itself. *See Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 97 n.8 (2d Cir. 2005) (expressing dissatisfaction with the term PRP because "*any* person is *conceivably* a responsible party under CERCLA," and because "the term may be read to confer on a party that has not been held liable a legal status that it should not bear") (emphases in original), *pet. for cert. pending*, No. 05-1323 (Apr. 14, 2006).

113(f)(1) claim and proceeded solely under Section 107(a). J.A. 34-37.

The government moved to dismiss on the ground that respondent, as a covered person, could not assert a cause of action under Section 107(a). J.A. 38-41. The district court dismissed the suit, relying on then-controlling circuit precedent to conclude that a covered person "cannot rely on Section 107(a) to seek full cost recovery on a theory of joint and several liability from another jointly liable party." Pet. App. 25a.

2. The court of appeals unanimously reversed. The court concluded that *Cooper* had upset the foundations of its earlier precedent precluding covered persons from proceeding under Section 107(a). The court explained that the plain language of Section 107(a) clearly granted a right of recovery to covered persons because the statutory phrase "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" Pet. App. 14a. Respondent, the court continued, "is such a 'person.'" *Id.* Emphasizing the important role of voluntary cleanups in CERCLA's remedial framework, the court further explained that it could "discern nothing in CERCLA's words, suggesting Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting—indeed, penalizing—those who voluntarily assume such duties." *Id.* at 17a.

SUMMARY OF ARGUMENT

This case will determine whether CERCLA will remain a *comprehensive* remedial regime for facilitating the prompt, voluntary cleanup of hazardous waste sites and the equitable allocation of cleanup costs among responsible parties, or whether it will effectively collapse under the weight of the loophole that the government self-servingly urges this Court to create. Specifically, the Court's decision will determine

whether private parties will continue to undertake the voluntary remediation of contaminated sites—or will instead be compelled by the absence of a cost-allocation mechanism to postpone cleanup until the initiation of government enforcement actions. The Court's decision will similarly determine whether hundreds of millions of dollars that have already been expended on voluntary cleanups will be allocated among all liable parties—or will instead be borne entirely by those responsible corporate citizens that voluntarily initiated the cleanups.

A. The plain language of Section 107(a) creates a cause of action for covered persons to recover a portion of their response costs from other liable parties. Section 107(a) provides that covered persons "shall be liable for" costs incurred by "the United States Government or a State or an Indian tribe" or "any other person." 42 U.S.C. § 9607(a)(4)(A), (B). The statutory language could not be clearer: The phrase "any other person" in Subsection (a)(4)(B) permits *any* person other than the government entities listed in Subsection (a)(4)(A)—including covered persons that have "incurred" "costs of response"—to recover their costs from any covered person. Read naturally, the term "other" distinguishes between the government entities entitled to sue under Section 107(a)(4)(A)—who are authorized to recover any response costs "not inconsistent with the national contingency plan"—and private persons entitled to sue under Section 107(a)(4)(B)—who are authorized to recover any response costs "consistent with the national contingency plan." Section 107(a) therefore creates a cause of action for "any . . . person" that has expended response costs, while establishing different burdens of proof for government entities and private parties.

This reading of the statutory text is confirmed by the rule of the last antecedent, which provides that a limiting clause—*i.e.*, the "any other person" clause in Subsection (a)(4)(B)—should be read as referring only to the phrase that it immedi-

ately follows—*i.e.*, the list of government entities set forth in Subsection (a)(4)(A)—as well as by this Court's prior interpretations of Section 107(a). *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989), *overruled on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

B. The government's strained reading of Section 107(a) defies the statute's plain language and several well-established rules of statutory construction. The government contends that the phrase "any other person" refers to—and excludes—covered persons. But the immediate antecedent for that phrase is the list of government entities that have also "incurred" costs—not covered persons generally. None of the cases that the government cites provides support for disregarding the immediate antecedent and instead reading "other" to relate back to the list of covered persons set forth earlier in the statute.

The legislative history to which the government points is equally unavailing. As the government notes, an earlier version of Subsection (a)(4)(B) reported out of committee provided a cause of action to the United States government, States, *and* "any person"—a formulation *that the government concedes "unambiguously" and "unquestionably" encompassed covered persons*. Pet. Br. 19, 23 (emphasis added). The government is wrong, however, to contend that the addition of the term "other," which was not the subject of any congressional debate, radically changed the scope of the statute. The addition was obviously stylistic, and may best be explained by the fact that the statute—contrary to ordinary canons of construction—expressly provides that the United States government and States may be considered "persons." This minor, unremarkable change cannot carry the heavy weight the government places on it.

C. The government further contends that authorizing covered persons to bring suit under Section 107(a) would impair CERCLA's carefully calibrated remedial regime and ef-

fectively render the contribution cause of action created in Section 113(f)(1) superfluous. But the two sections fit together perfectly: Section 107(a) provides covered persons, as well as all other persons, a cause of action to recover "costs of response" that they themselves have "incurred" remediating a site; Section 113(f)(1) creates a derivative contribution claim for persons sued under Section 107(a) to recover a portion of the liability assessed against them.

CERCLA's legislative history confirms that Sections 107(a) and 113(f)(1) provide distinct causes of action for differently situated parties. Indeed, it was firmly established when Congress enacted Section 113(f)(1) in 1986 that Section 107(a) cost-recovery actions *were* available to covered persons to recover "costs of response" they had "incurred" during a voluntary remediation. There was, however, some dispute concerning whether CERCLA, or federal common law, authorized any actions for contribution. There is no indication in the statutory text or legislative history that, in amending CERCLA to add an express cause of action for *contribution*—and thus dispelling the existing ambiguity in favor of the additional remedy—Congress simultaneously intended to eliminate the then well-established right of covered persons to bring suit under Section 107(a) to recover their own response costs.

Under this framework, CERCLA's limitations periods, settlement protection scheme, and liability standards work in harmony to create a comprehensive remedial statute. Indeed, it is the government's reading of Section 107(a) that would undermine the effectiveness of CERCLA's regulatory framework by denying voluntary remediators a cost-recovery mechanism.

D. The government's position would also effectively immunize the United States from its substantial share of CERCLA liability at the many sites now being voluntarily remediated throughout the country. If Section 107(a) were

unavailable to voluntary remediators, they would effectively be unable to recover any of their cleanup costs from the government unless the government first initiated a CERCLA enforcement action against them. In addition to discouraging private parties' voluntary remediation efforts, such a result would contravene CERCLA's explicit directive that the federal government receive the same treatment as all other parties responsible for the discharge of hazardous waste. *See* 42 U.S.C. § 9620(a).

ARGUMENT

SECTION 107(a) OF CERCLA CREATES A CAUSE OF ACTION FOR ANY PERSON WHO INCURS RESPONSE COSTS.

As this Court recognized when construing Section 113(f) in *Cooper*, the interpretation of CERCLA depends "first and foremost" on the statute's text. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994); *see also Cooper*, 543 U.S. at 167. That principle is dispositive here because the plain language of Section 107(a) authorizes *any* person who has incurred response costs—including a covered person such as respondent—to seek recovery of those costs from another covered person. Because respondent's suit falls squarely within the scope of Section 107(a), this case should begin—and end—with a straightforward application of the provision's text. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989).

A. The Plain Language Of Section 107(a) Authorizes Cost-Recovery Actions By Covered Persons.

Subparagraphs (1) through (4) of Section 107(a) describe four categories of "covered persons." 42 U.S.C. § 9607(a)(1)-(4). The statute then states that these "covered persons" "shall be liable for"

> (A) all costs of removal or remedial action *incurred by the United States Government or a State or an In-*

> *dian tribe* not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response *incurred by any other person* consistent with the national contingency plan; . . . .

42 U.S.C. § 9607(a)(4)(A)-(B) (emphases added).

Subsections (a)(4)(A) and (a)(4)(B) use parallel structures to create a comprehensive liability framework. The phrase "any other person" in Subsection (a)(4)(B) refers back to the categories of persons—the United States government, or a State, or an Indian tribe—expressly mentioned in Subsection (a)(4)(A) and creates a cause of action for *any* person—including covered persons—not entitled to sue under Subsection (a)(4)(A). *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)).

This reading of Section 107(a) is confirmed by the rule of the last antecedent, which provides that "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it *immediately* follows." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005) (internal quotation marks and alteration omitted; emphasis added). In Section 107(a), the phrase "any other person" distinguishes those parties entitled to sue under Subsection (a)(4)(B) from the immediately preceding list of government entities authorized to sue under Subsection (a)(4)(A). Indeed, the version of Section 107(a)(4)(B) initially reported out of a Senate committee in 1980 authorized suits by the United States, States of the Union, *and* "any person"—a formulation that the government concedes reached covered persons. Pet. Br. 19, 23. Because the United States and the States are expressly included within CERCLA's definition of "person" (42 U.S.C. § 9601(21)), the term "other" was most likely added

to clarify the distinction between the statutorily defined persons authorized to sue under Subsection (a)(4)(A)—the United States government or the States—and the persons authorized to sue under Subsection (a)(4)(B). This stylistic revision did not substantively alter the scope of Subsection (a)(4)(B). *See* 126 CONG. REC. 30932 (Nov. 24, 1980) (statement of Sen. Randolph) (discussing amendments to the initial version of CERCLA that "warrant[ed] close scrutiny," and making no mention of the addition of the word "other" to Section 107(a)(4)(B)); *see also infra* 16.

Properly understood, Subsections (a)(4)(A) and (a)(4)(B) create two different classes of plaintiffs. The government entities that possess a cause of action under Subsection (a)(4)(A) can recover any costs "not inconsistent with the national contingency plan"—a set of regulations promulgated by the EPA to implement CERCLA (40 C.F.R. pt. 300)—while "any other person" can bring suit under Subsection (a)(4)(B) to recover costs "consistent with the national contingency plan." Thus, although covered persons are entitled to sue under Subsection (a)(4)(B), they face a higher recovery threshold than government entities bringing suit under Subsection (a)(4)(A) because they bear the burden of establishing that the costs they expended were "consistent with" the national contingency plan.

Indeed, the Court has previously endorsed this plain reading of Section 107(a). In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court explained that CERCLA "allow[s] private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the *other* potentially responsible parties." *Id.* at 21-22 (emphasis added). Similarly, in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), the Court confirmed that Section 107(a) "authorizes private parties to recover cleanup costs from *other* PRPs." *Id.* at 818 (emphasis added). Although *Key Tronic*'s discussion

of this issue was termed "dictum" in *Cooper* (543 U.S. at 170), the fact remains that no Justice in *Key Tronic* "expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement." *Id.* at 172 (Ginsburg, J., dissenting).

Moreover, a contrary reading of Section 107(a) would significantly unsettle CERCLA's statutory framework. If covered persons were not entitled to seek recovery under Section 107(a), then even truly innocent landowners, such as bona fide purchasers, who voluntarily remediated hazardous waste on their property would be left without a means of recovering their costs from those parties responsible for the pollution. In order to avoid this result, the government attempts to draw a distinction between "innocent" covered persons, who the government contends are entitled to bring suit under Section 107(a), and "non-innocent" covered persons, who the government excludes from the reach of Section 107(a). *See* Pet. Br. 15-16. But this distinction is found nowhere in the statutory language. CERCLA does not exempt "innocent" parties from the definition of covered persons in Section 107(a)(1)-(4), but rather recognizes certain narrow defenses from liability. *See* 42 U.S.C. §§ 9601(35), 9607(b)(3) (innocent landowner defense); *id.* §§ 9601(40), 9607(r)(1) (bona fide prospective purchasers). These defenses do not remove innocent parties from the broadly worded definitions of covered persons in Section 107(a)(1)-(4).

B. The Government's Reading Of Section 107(a) Is Fundamentally Flawed.

Subsections (a)(4)(A) and (a)(4)(B) create two parallel classes of plaintiffs who have "incurred" response costs: the government entities listed in Subsection (a)(4)(A) and "any other person," as provided in Subsection (a)(4)(B). Given this parallelism, the most straightforward and natural reading of the modifier "other" in the phrase "any other person" distinguishes between the government entities mentioned di-

rectly above in Section 107(a)(4)(A) and those persons—any persons other than those explicitly authorized to sue under Section 107(a)(4)(A)—entitled to sue under Section 107(a)(4)(B). The government, however, asserts that the "other" modifier leapfrogs over the persons referenced in Section 107(a)(4)(A) and the intervening verb phrase—"shall be liable for"—and refers back to the categories of covered persons set forth in Section 107(a)(1)-(4). Pet. Br. 15-16. This convoluted statutory construction not only defies the "clear meaning of the text" (*Cooper*, 543 U.S. at 167), but also violates several interpretive canons—including the canons on which the government purports to rely.

1. In *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345 (1920), the Court determined that the concluding statutory phrase "not domiciled in Porto Rico" should apply to a short integrated list of persons, including "citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States." *Id.* at 348. Unlike the phrase at issue in *Mor*, which came at the end of "several words" and was clearly applicable to the first as well as the last (*id.*), the phrase "any other person" in Section 107(a)(4)(B) is separated from the covered persons set forth in Section 107(a)(1)-(4) by a verb phrase ("shall be liable for") and by the government entities listed in Section 107(a)(4)(A). Indeed, Section 107(a) is structured in two distinct parts: The first lists those persons who are responsible under the section, and the second sets forth to whom and for what the responsible persons are liable. It is not a simple integrated list of related examples, and it would do violence to the language to read "other" in Subsection (a)(4)(B) to leapfrog back to the four categories of covered persons listed in Section 107(a)(1)-(4).

Jama is no more helpful than *Mor* to the government's position. In *Jama*, the Court rejected the argument that the statutory phrase "another country whose government will accept the alien" applied not only to the "country" immediately

preceding the phrase, but also to countries described in separate, prior subparagraphs. 543 U.S. at 340. Relying upon the rule of the last antecedent, the Court explained that the petitioner's effort to "seize[] upon the word 'another' . . . as a means of importing the acceptance requirement into [other] clauses . . . stretche[d] the modifier too far." *Id.* at 342.

The government is attempting a similar interpretive somersault here by shifting the focus of the phrase "any other person" past its most natural target—the government entities mentioned in Subsection (a)(4)(A)—back to the covered persons mentioned in a more remote part of the statute. The government's attempt to manufacture a connection between "other" and the list of covered persons "stretches the modifier too far" by disregarding the persons listed in Section 107(a)(4)(A).

Moreover, although it is certainly true, as the government asserts, that the terms "both," "other," and "another" are "'just as likely to be words of *differentiation* as they are to be words of connection'" (Pet. Br. 15 (*quoting Jama*, 543 U.S. at 343 n.3)), that point does not support the government's reading of Section 107(a). The term "other" in Subsection 107(a)(4)(B) differentiates between the persons listed in Subsection (a)(4)(A)—the United States government or a State or an Indian tribe—and all "other" persons, including covered persons, entitled to bring a cost-recovery action under Subsection (a)(4)(B). The term does not need to reach all the way back to the list of covered persons to serve a differentiating function. *See, e.g., United States v. Standard Brewery*, 251 U.S. 210, 218 (1920) ("we think it clear that the framers of the statute intentionally used the phrase 'other intoxicating' as relating to and defining the *immediately preceding designation* of beer and wine") (emphasis added).[3]

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[3] Congress's addition of the word "other" to differentiate between the parties entitled to sue under Subsections (a)(4)(A) and (a)(4)(B) was

2. The government also suggests that its reading of Section 107(a) is compelled by the interpretive canon that urges courts to construe statutes "in such fashion that every word has some operative effect." Pet. Br. 20 (internal quotation marks omitted). The government asserts that the word "other" in the phrase "any other person" becomes superfluous if it does not differentiate covered persons from persons entitled to sue under Subsection (a)(4)(B) because the phrase "other necessary costs" already distinguishes parties authorized to sue under Subsections (a)(4)(A) and (a)(4)(B).

The phrase "other necessary *costs*," standing alone, would be an exceedingly odd—and unclear—means of excluding the government *entities* listed in Subsection (a)(4)(A) from bringing suit under Subsection (a)(4)(B). It is far more natural to read the phrase "any other *person*" as performing that function, and to recognize that in referring to "other . . . costs," Congress most likely merely chose to reinforce the distinction between "costs" that may be recovered under Subsection (a)(4)(A)—*i.e.*, those "consistent with the national contingency plan"—and those that may be sought under Subsection (a)(4)(B)—*i.e.*, those "not inconsistent with the national contingency plan."

Indeed, the interpretive canon invoked by the government is typically used to avoid interpretations that would render other statutory sections wholly superfluous, not to prevent Congress from using several different terms to reinforce a statute's meaning. In *Gutierrez v. Ada*, 528 U.S. 250 (2000), the Court warned against overreliance on this canon of construction and explained that "as one rule of construction

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[Footnote continued from previous page]

necessary because the definition of "person" under 42 U.S.C. § 9601(21) explicitly includes the United States and the States. The phrase "any *other* person" clarifies that, although the United States and the States are persons within the meaning of CERCLA, they must seek relief under Subsection (a)(4)(A), rather than Subsection (a)(4)(B).

among many, . . . the rule against redundancy does not necessarily have the strength to turn a tide of good cause to come out the other way." *Id.* at 258. The Court concluded that the phrase "any election" in the statute before it had "some clarifying value," and even though "[t]hat may not be very heavy work for the phrase to perform, . . . a job is a job, and enough to bar the rule against redundancy from disqualifying an otherwise sensible reading." *Id.*

Here, the phrase "any other person" most naturally distinguishes the *persons* entitled to sue under Subsection (a)(4)(A) and Subsection (a)(4)(B). Even assuming arguendo that—standing alone—the phrase "other necessary costs" might conceivably be used to convey the same distinction, it is not the most obvious candidate for doing so where, as here, Congress used language that is far more apposite. Moreover, it would be strange indeed if, as the government contends, the first "other" in Subsection (a)(4)(B) referred back to the costs referenced in Subsection (a)(4)(A), while the second "other" referred not to the government entities set forth in Subsection (a)(4)(A) but to the covered persons listed back in Section 107(a)(1)-(4). The government can muster no precedent or interpretive principle to support such an unintuitive reading of Section 107(a).

3. The government also relies heavily on the fact that the language that became Section 107(a)(4)(B) was modified while the Senate debated the bill. It notes that the phrase in question at one time made covered persons liable "for 'all costs of . . . remedial action incurred by the United States Government or a State, and . . . any other costs incurred *by any person* to remove a hazardous substance.'" Pet. Br. 18-19 (quoting S. 1480, 96th Cong. § 4(a) (as reported Nov. 18, 1980)). Although the government *concedes* that this language "unambiguously" includes covered persons, it contends that "the only plausible explanation" for the subsequent addition of the word "other" before "person" "was that Congress intended to exclude PRPs from bringing suit." *Id.* at 19.

Far from being "the only plausible explanation," the government's reading is implausible in the extreme. Indeed, it seems plain that the word "other" was most likely added before "person" in order to avoid an obvious redundancy: While traditional rules of construction stipulate that the United States and States of the Union generally are not "persons" (*see United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989)), CERCLA expressly reverses that rule and provides that both sovereigns *are* "persons." 42 U.S.C. § 9601(21). The phrase "any person" would thus include both the United States and the States, rendering wholly redundant the express references to both in the preceding clause. A simple stylistic change—placing "other" before "person"—neatly solved that problem without altering the intended, broad meaning.[4]

Significantly, those revisions to Section 107(a) that were intended to have substantive effects were the subject of extensive congressional debate. For example, the legislative history is replete with references to the deletion of the phrase "joint and several liability" between the July 11 and November 18 versions. *See, e.g.*, 126 CONG. REC. 30932 (statement of Sen. Randolph) ("we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable"); 126 CONG. REC. 30972 (Nov. 24, 1980) (statement of Sen. Helms). By the government's own admission, the statutory language "unambiguously" permitted actions by covered per-

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[4] Indeed, when the version of Section 107(a) reported on July 11, 1980, which does not include the "other person" formulation, is compared with the November 18 version, which does, a host of revisions are evident, many of which have no apparent substantive import at all. For example, language specifying that covered persons are liable by virtue of a "release" was repositioned from a separate line underneath Section 107(a)(4) and integrated into Section 107(a)(4) itself. Courts have confirmed that this revision had no substantive implications. *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 n.16 (2d Cir. 1985).

sons *before* "other" was inserted before "person." Yet there is not a shred of evidence that a single legislator believed the reach of the statute had been drastically curtailed—as now urged by the government—by virtue of that change. In fact, when Senator Randolph, CERCLA's cosponsor in the Senate, reviewed on the Senate floor a list of changes that "warrant[ed] close scrutiny" (126 CONG. REC. 30932), he made no mention of the exclusion of covered persons from the ambit of the cost-recovery cause of action. That deafening silence persuasively belies the government's inventive attempt to pass off a minor stylistic change as a waters-parting event. *See Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987).

This Court has made clear that it is incompatible with the realities of the legislative process to ascribe meaning to every modification of statutory language, because numerous revisions having no substantive implications are made both during the initial drafting process and through subsequent amendments. In *Jama*, for example, the Court rejected the argument that a change from "any country" to "another country" worked a "momentous limitation upon executive authority" because there were "numerous changes [between the two versions] that [were] attributable to nothing more than stylistic preference." 543 U.S. at 343 n.3 (emphasis omitted). In the absence of some explanation as to why this revision warranted special attention, the Court was unwilling to read it as anything more than a stylistic change. The holding in *Jama* applies *a fortiori* to mere drafting edits, such as the one on which the government relies here.

C. Allowing Covered Persons To Recover Response Costs Under Section 107(a) Is Consistent With The Overall Structure And Legislative Objectives Of CERCLA.

The government further contends that a decision authorizing covered persons to recover response costs under Section 107(a) would render Section 113(f)(1) superfluous and un-

dermine the settlement protection scheme and other procedural features of CERCLA. But, in so arguing, the government again ignores the plain language of Section 107(a) and the coherent, comprehensive structure of CERCLA's regulatory framework.

1. Sections 107(a) and 113(f)(1) are "distinct" provisions that work together to create a comprehensive regime for the recovery of hazardous waste cleanup costs. *See Cooper*, 543 U.S. at 163 n.3 ("The cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct."). Each section addresses private plaintiffs in different positions.

Persons eligible to file suit under Section 107(a) have "incurred" "costs of response" in remediating a hazardous waste site and can use the section's cost-recovery cause of action to recover a portion of those costs from other responsible parties. Persons eligible to seek contribution under Section 113(f)(1) have not themselves expended response costs but have instead been sued under Section 107(a) and can use the contribution cause of action to apportion liability among other covered persons. *See* Pet. Br. 23 (defining "contribution" as "a claim by one party to recover an amount from a jointly liable party after the first party had extinguished a disproportionate share of their common liability") (emphasis omitted). Thus, covered persons cannot simply pick and choose between Sections 107(a) and 113(f)(1) at their whim; they are limited to Section 107(a) when seeking "costs of response" they have "incurred" themselves, and Section 113(f)(1) when seeking contribution for costs for which they have been held liable in a Section 107(a) action.

2. The legislative history of CERCLA, and the congressional objectives that animate the statute, confirm that Sec-

tions 107(a) and 113(f)(1) create causes of action for differently situated parties.

a. Congress enacted CERCLA in 1980 to respond to the significant environmental and public-health hazards posed by industrial pollution. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *Id.* at 56 n.1 (internal quotation marks omitted).

Congress designed the remedial provisions of Section 107(a) to promote both government-initiated and voluntary cleanup efforts by the private sector. *See* S. REP. NO. 848, 96th Cong., 2d Sess., at 31 (1980) ("This liability standard is intended to induce potentially liable persons to *voluntarily mitigate damages* rather than simply rely on the government to abate hazards.") (emphasis added).[5] As lower courts have recognized, "[t]his expressed goal of achieving voluntary cleanup is directly enhanced by Congress' including in section 107(a)(4)(B) the ability of responsible persons to recover voluntarily incurred response costs from other responsible persons." *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986).

Indeed, in the years immediately following CERCLA's enactment, "[v]arious courts held that § 107(a)(4)(B) . . . authorized . . . a cause of action" between a "private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit," and "other PRPs." *Cooper*, 543 U.S. at 161-62 (citing *Wickland Oil Terminals v. Asarco,*

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[5] *See also* 126 CONG. REC. 26338 (Sept. 19, 1980) (statement of Rep. Florio) ("[Section 107] accomplishes three objectives. It assures that the costs of chemical poison releases are borne by those responsible for the releases. It creates a strong incentive both for prevention of releases *and voluntary cleanup* of releases by responsible parties.") (emphasis added).

Inc., 792 F.2d 887, 890-92 (9th Cir. 1986); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140-43 (E.D. Pa. 1982)).

The government attempts to sow doubt about the early interpretation of Section 107(a)(4)(B), but is unable to cite a single case decided before the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA") that rejected a covered person's right to recover cleanup costs under Section 107(a). And although the government claims to be "aware of only two federal courts that had unambiguously held that a PRP was entitled to sue another PRP for costs" (Pet. Br. 28), several decisions that the government does not mention also concluded that covered persons had a right of recovery under Section 107(a). *See Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987); *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 616-17 (S.D.N.Y. 1986); *Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp.*, 1984 U.S. Dist. LEXIS 24317, at *11 (E.D. Tenn. Aug. 16, 1984); *see also Pinole Point Props., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 291 (N.D. Cal. 1984) (holding that covered persons can assert a cause of action under Section 107(a) because "any other person" in Section 107(a)(4)(B) "refers to persons other than the state and federal government rather than to persons other than those liable under the Act").

Although an unambiguous and unbroken line of precedent emerged holding that Section 107(a) authorized covered persons to bring suit to recover voluntarily "incurred" "costs of response," CERCLA, as originally enacted, was silent concerning "whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain *contribution* from other PRPs." *Cooper*, 543 U.S. at 162 (emphasis added). In light of this Court's decisions limiting the availability of implied contribution rights (*see, e.g., Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451

U.S. 630, 638-47 (1981)), the lower courts were divided as to whether a right to contribution was available under either CERCLA itself or the federal common law. *Compare New Castle County*, 642 F. Supp. at 1261-69, *with United States v. Westinghouse Elec. Corp.*, 1983 WL 160587, at *3-*4 (S.D. Ind. June 29, 1983).

As a result of this uncertainty about the availability of derivative contribution claims, Congress enacted Section 113(f) in the 1986 SARA amendments to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA" to seek contribution from other covered persons. H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 79 (1985). SARA did not modify Section 107(a), and there is absolutely no indication that Congress intended for it to disturb the right of covered persons to recover their cleanup costs through a cost-recovery action under Section 107(a)(4)(B), which had been recognized in decisions such as *Wickland Oil* and *Stepan Chemicals*. *See Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (it is a "cardinal rule . . . that repeals by implication are not favored") (internal quotation marks omitted). As this Court has made clear, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979).

b. With this background in mind, it strains credulity to assert—as the government does—that when codifying the right of covered persons to pursue a contribution action in Section 113(f), Congress simultaneously restricted the right of voluntary remediators to file a cost-recovery action under Section 107(a). The government's argument relies on canons of construction providing that the implications of a statute may be altered by the implications of a later enactment and that a more specific statute takes precedence over a more general one. Pet. Br. 26-27 (citing *United States v. Fausto*,

484 U.S. 439, 453 (1988); *Busic v. United States*, 446 U.S. 398, 406 (1980)). These interpretive tools simply do not support the broad result that the government seeks. They confirm that the enactment of Section 113(f) resolved the uncertainty about the availability of a contribution action under CERCLA—and, at most, that claims that sound in contribution may be pursued solely under Section 113(f) rather than under Section 107(a). They provide no support, however, for the government's reading of Section 107(a), because it was already well-established at the time of Section 113(f)'s enactment that covered persons could seek cost recovery under Section 107(a) and because nothing in the text of Section 113(f) amended Section 107(a) or otherwise restricted the availability of cost-recovery actions.[6]

Moreover, the legislative history indicating that Congress sought to promote negotiated settlements through SARA does not even remotely suggest that Congress—without modifying the language of Section 107(a) in any way—intended to eliminate the right of voluntary remediators to recover their response costs under Section 107(a). Indeed, the government can cite to no explicit statement in SARA's legislative history that indicates that Congress sought to preclude covered persons from recovering voluntary cleanup costs under Section 107(a). To be sure, when Congress enacted SARA, it was attempting to encourage settlements (Pet. Br. 39-40), but it did so as an alternative to lengthy litigation—not as an alternative to voluntary cleanups by private parties. *See* H.R. REP. NO. 253, pt. 1, at 58-59 ("These provisions should encourage

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[6] The government is therefore wrong to take issue with the court of appeals' conclusion that, notwithstanding the right of covered persons to seek cost recovery, Section 113(f) provides the exclusive mechanism for a covered person to recover a portion of the liability assessed against it in a Section 107(a) action. Pet. Br. 22. The interpretive canons on which the government itself relies substantiate the distinction that the court of appeals identified between suits under Sections 107(a) and 113(f).

quicker, more equitable settlements, decrease litigation and thus facilitate cleanups."). In the six years between the enactment of CERCLA and its amendment through SARA, protracted CERCLA litigation had become common because covered persons routinely resisted the EPA's cleanup demands, which compelled the EPA to resort to costly litigation against recalcitrant parties. In SARA, Congress "tried . . . to refocus the intent of the [CERCLA] program back on cleaning up the sites and away from the slow and costly litigation." 131 CONG. REC. 24728 (Sept. 24, 1985) (statement of Sen. Domenici). Despite the government's claim to the contrary, congressional support for voluntary cleanups was unwavering during the consideration of SARA.[7]

The government further suggests that Congress's focus on negotiated settlements during the SARA debate indicates a desire on the part of Congress to place all cleanups under the control and regulation of the EPA. Congress, however, was well aware in 1986 that the EPA was not in any position to assume a more comprehensive oversight role. Indeed, the General Accounting Office had issued numerous reports to Congress regarding the EPA's enforcement of CERCLA. These reports painted a bleak picture of an agency overwhelmed and understaffed, and unable to meet the requirements of CERCLA or the expectations of Congress. *See* Gen. Accounting Office, *Hazardous Waste, Adequacy of EPA Attorney Resource Levels* (GAO/RCED-86-81FS) (1986). Indeed, the House Report accompanying SARA neatly summarizes the situation: "Under the initial leadership of Assistant Administrator Lavelle, the [CERCLA] program was victim-

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[7] *See, e.g.*, H.R. REP. NO. 253, pt. 5, at 58 ("Voluntary cleanups are essential to a successful program."); 131 CONG. REC. 24730 (Sept. 24, 1985) (statement of Sen. Domenici) ("One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.").

ized by gross mismanagement. . . . [O]ver twenty top-level officials, including the Administrator of the EPA, resigned or were fired from their jobs. Assistant Administrator Lavelle is currently serving a jail term [for lying to Congress]." H.R. REP. NO. 253, pt. 1, at 55.

Any concern about the quality of voluntary cleanups was addressed not by precluding voluntary remediators from recovering response costs under Section 107(a) but by limiting recovery to those costs that are consistent with the cleanup standards set forth in the national contingency plan. Indeed, courts routinely review the cleanups underlying Section 107(a) claims to ensure that this requirement is met. *See, e.g., Carson Harbor Vill. v. County of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006) (denying a Section 107(a) claim because the cleanup violated the public comment requirement in the national contingency plan). Voluntary remediators are discouraged from performing unsafe, unnecessary, or inadequate cleanups because they will be unable to recover their costs from other responsible parties if they cannot establish that the costs were "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).[8]

3. The plain language and legislative history therefore establish that Sections 107(a) and 113(f) create distinct, non-overlapping causes of action. Covered persons can sue under Section 107(a) to recover "costs of response" that they have

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[8] The government cites an isolated report in the *Federal Register* issued three years before SARA's enactment as evidence that the EPA "disfavored" private party cleanups and sought to restrict the ability of voluntary remediators to sue under Section 107(a). *See* Pet. Br. 40 (citing 48 Fed. Reg. 40661 (1983)). But the significance of the report is not that the EPA discouraged voluntary cleanups, but that it could not vouch for the quality of sites with which it had no involvement. Indeed, the EPA explicitly stated in the document that it did "not intend[] to preclude responsible parties from taking voluntary response actions outside of a consent agreement." 48 Fed. Reg. at 40661.

"incurred" themselves; they can seek contribution under Section 113(f)(1) for liability to another covered person incurred during a Section 107(a) action. This distinction alleviates all of the potential structural concerns raised by the government.

Statute of Limitations: Permitting covered persons to sue under Section 107(a) does not facilitate evasion of the statute of limitations for suits under Section 113(f)(1). A person who has incurred response costs can seek recovery of those costs under Section 107(a) in accordance with the six-year statute of limitations established by Section 113(g)(2). *See* 42 U.S.C. § 9613(g)(2). The defendant in that action may maintain a separate Section 113(f)(1) action against other covered persons named in the initial action, other covered persons that have not been named, or against the original plaintiff. Any such derivative contribution action must be filed within three years of a judgment or settlement in the original action. *See id.* § 9613(g)(3). Because the nature of the underlying claim determines whether Section 107(a) or Section 113(f)(1) applies, it is impossible for a person that is outside the three-year statute of limitations for Section 113(f)(1) contribution actions to take advantage of the six-year limitations period for Section 107(a) actions. If a covered person has been sued for response costs expended by another person, the only claim available to it is a derivative contribution action under Section 113(f)(1), which is subject to a three-year limitations period. Covered persons thus do not have a choice between limitations periods.

The Contribution Protection Scheme: The government's contention that Section 107(a) actions by voluntary remediators would eviscerate CERCLA's contribution protection scheme for parties that settle with the government is equally unavailing. The contribution protection afforded by Section 113(f)(2) applies to settlements with the United States or a State, and only covers "matters addressed in the" government settlement. 42 U.S.C. § 9613(f)(2). The scope of settlement protection therefore does not, as the government represents,

extend to cleanup costs incurred by private persons. *See, e.g., Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 766 n.7 (7th Cir. 1994) (permitting a nonsettling covered person to assert a claim against a settling covered person "because the decree defines 'covered matters' only in terms of claims available to the United States and the State of Indiana, [and] claims that [the nonsettling covered person] might have based on its own work would seem by definition excluded") (emphases omitted).

If the United States sues to recover its costs against multiple defendants, the availability of contribution protection encourages the defendants in that suit to settle with the United States because a settling party will not be subject to contribution actions under Section 113(f)(1) by other defendants seeking to recover a portion of the government's costs for which they have been held liable. Moreover, these nonsettling defendants would not be able to sue the settling defendant under Section 107(a) for the matters addressed in the settlement because they would not themselves have incurred the response costs in question; those costs would instead have been incurred by the government during its cleanup efforts. But a nonsettling covered person could bring a Section 107(a) action to recover a portion of its own cleanup costs from the settling defendant because those costs would not be "matters covered" by the settlement. *See Akzo*, 30 F.3d at 767.

Because a nonsettling covered person's suit for costs incurred by the government would, by definition, be a derivative claim under Section 113(f)(1), a covered person could not simply "choose" to file a Section 107(a) action to circumvent the settlement protection scheme.[9]

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[9] Take, for example, the situation of Alpha Corp., which incurs $50,000 in response costs investigating groundwater in the vicinity of its facility and then stops work after determining that the contamination was not released from its facility. The federal government then spends $1 million to investigate and initiate a remedial action, and sues Alpha, as well as Bravo

Equitable Apportionment of Response Costs: The government also argues that authorizing covered persons to bring suit under Section 107(a) would result in the inequitable apportionment of costs because of the availability of joint and several liability in Section 107(a). But the defendants in a Section 107(a) action are free to assert contribution claims against the original plaintiff under Section 113(f)(1). The court would then be in a position to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Moreover, there is nothing in the text of Section 107(a) that mandates application of joint and several liability. A provision that would have required joint and several liability was deleted from the statute during the drafting process. *See United States v. Wade*, 577 F. Supp. 1326, 1337 (E.D. Pa. 1983) (deletion of the "reference to joint and several liability was intended to avoid mandatory application of that standard to a situation where it would produce inequitable results"). In-

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Corp., Charlie Corp., and Delta Corp., under Section 107(a) to recover its response costs. The government enters into a settlement with Alpha for $100,000 and with Bravo for $200,000. Alpha then seeks to recover all of its costs from the other covered persons because it believes that it is not liable for any of the releases in question. Alpha cannot seek recovery of the $100,000 from Bravo under Section 113(f)(1) because Bravo has contribution protection for the government's costs. Alpha also cannot seek recovery of the $100,000 from Bravo under Section 107(a) because it has not incurred these response costs itself—the government has. Bravo is therefore fully protected under the terms of the statute. Alpha *can* seek contribution under Section 113(f)(1) for the $100,000 that it paid to the government from Charlie and Delta because they have not settled with the government. Moreover, the settlement protection does not prohibit Alpha from seeking recovery of the $50,000 in response costs against all other covered persons, including Bravo, pursuant to Section 107(a), because Bravo's contribution protection extends only to matters addressed in the settlement with the government—*i.e.*, the government's own cleanup costs.

deed, several courts that addressed the apportionment of liability in Section 107(a) actions prior to adoption of Section 113(f)(1) endorsed an equitable allocation of response costs among covered persons. *See, e.g., New York v. Shore Realty Corp.*, 648 F. Supp. 255, 259 (E.D.N.Y. 1986); *Wehner v. Syntax Agribusiness, Inc.*, 616 F. Supp. 27 (E.D. Mo. 1985).

Ultimately, it is ironic that the government is relying on the specter of the inequitable allocation of response costs to support depriving voluntary remediators of a right to recovery under CERCLA. Nothing could be more inequitable than leaving a responsible corporate citizen that has voluntarily undertaken remedial action to bear cleanup costs for which other parties may be at least partially liable. CERCLA's text and structure give no indication that Congress intended such an inequitable—and nonsensical—result.

D. The Decision Below Creates A Loophole That Enables The United States To Escape CERCLA Liability.

The government's interpretation of Section 107(a) should be rejected for the additional reason that it creates a loophole that could effectively shield the United States from CERCLA liability and thereby significantly undermine the statute's ability to promote prompt hazardous waste cleanups and the equitable allocation of response costs.

1. The federal government is itself a covered person at numerous sites throughout the country. Indeed, 157 of the 1,244 sites on the CERCLA National Priorities List—a list of the most-contaminated sites in the Nation—are federal facilities currently or formerly owned by the United States.[10] If covered persons are prohibited from asserting cost-recovery actions under Section 107(a), the federal government would

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[10] The United States faced $305 *billion* in environmental liabilities at the end of fiscal year 2006. *See* U.S. Dep't of the Treasury, *Financial Report of the United States Government* (2006).

effectively be given a veto over the right of other covered persons to recover cleanup costs from it. At any site at which the federal government is a covered person, no private party would be authorized to initiate a contribution claim against it in the absence of a CERCLA enforcement action brought by the federal government or a State. Because it is rare for state regulators to file suit under CERCLA, rather than relying upon state-law remedies, such a rule would effectively hand the federal government the keys to its own CERCLA liability and afford the government the power to avoid liability by declining to initiate enforcement actions. This result is wholly inconsistent with Congress's clear intention that the United States be treated just like a private party under CERCLA. *See* 42 U.S.C. § 9620(a) ("Each department, agency, and instrumentality of the United States . . . shall be subject to . . . this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act.").

2. Indeed, the federal government has consciously pursued a litigation strategy in which it has advocated conflicting legal theories in an apparent effort to minimize its exposure under CERCLA. The government has previously represented to this Court that the "any other person" formulation in Section 107(a) encompasses covered persons. *See* Br. for the United States as *Amicus Curiae* Supporting Petitioner at 20-21, *Cooper* (No. 02-1192) ("Section 107(a)(1)-(4)(B)'s reference to 'any person' is broad enough to allow one jointly liable party to sue another for the former's response costs"). Without a word of explanation for its shifting litigation position, the government now contends that CERCLA provides *no* remedial rights for voluntary remediators.

The government's inconsistent arguments regarding the ability of covered persons to pursue cost-recovery actions represent only one example of its ever-shifting interpretations of CERCLA. In *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), for example, the

government argued that Section 107(a) cost-recovery actions cannot be brought by covered persons because contribution claims are available to such parties under Section 113(f)(1). *See* U.S. Br. at 28, *Centerior* (No. 97-3163). Having successfully persuaded several circuits to hold that covered persons cannot pursue Section 107(a) cost-recovery actions by emphasizing the availability of Section 113(f)(1) contribution claims, the government then turned around in *Cooper* and argued that covered persons may not recover voluntarily incurred cleanup costs through the very contribution mechanism that it had previously endorsed before the lower courts.

If the Court agrees with the government in this dispute, it will have effectively immunized the United States from CERCLA liability, at the expense of the environment and private industry. Any interpretation of CERCLA that creates a loophole by which the federal government might escape a portion of its extensive environmental liability seriously undermines CERCLA's objectives of remediating hazardous waste and fairly allocating cleanup costs.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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